

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FIRESIDE VENTURE ASSOCIATES	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Fireside Venture Associates, c/o Canavan & Boehm, 29 Park Avenue, Manhasset, New York 11030, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 804660).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 11, 1988 at 1:55 P.M. Petitioner appeared by Canavan & Boehm (Thomas J. Canavan, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq. and Mark Volk, Esq., of counsel).

ISSUE

Whether a penalty under Tax Law § 1446.2(a) for the late payment of the real property gains tax can be waived for reasonable cause and absence of willful neglect where the property was under reconstruction (conversion to condominium units) in March 1983 when the gains tax was enacted, but where the sales of condominium units subject to tax did not take place until a year later and the transferor claims lack of funds at that time.

FINDINGS OF FACT

1. Petitioner is a limited partnership with its principal office at 29 Park Avenue, Manhasset, New York. Its general partner was 95th Street Fireside Corp. The shareholders in 95th Street Fireside Corp. were Thomas J. Canavan and Steven A. Kessner. Petitioner was the owner of the buildings at 226 and 228 East 95th Street, Manhattan and was the sponsor of a plan to convert those buildings to cooperative ownership.

2. Reconstruction work began on the buildings in late 1981 or early 1982. Petitioner ran out of funds and, by an agreement dated December 29, 1982, borrowed an additional \$200,000.00 from a private investor in return for 18 percent of the profits. Subsequently, petitioner borrowed an additional \$150,000.00 from the American Savings Bank, which had financed the project earlier. Other funds were advanced by the limited partners.

3. Petitioner sold the properties to Fireside Tenants Corp. on March 30, 1984 in exchange for 8,276 shares of stock. Petitioner allocated these shares to its 29 residential apartments and

offered them for sale.

4. The shares in the residential apartments were all sold between March 30, 1984 and January 29, 1985.

5. Petitioner paid \$100,000.00 toward its gains tax liability on May 2, 1985.

6. The transferor's questionnaire due on the sale of property subject to gains tax was filed on April 21, 1986.

7. (a) A notice of determination was issued on May 21, 1987 to petitioner for real property gains tax under Article 31-B of the Tax Law, in the amount of \$124,706.00, penalty under Tax Law § 1446.2 of \$38,647.00 and interest of \$18,974.00, for a total amount due of \$182,327.00. All but the penalty has been paid.

(b) The penalty determined in this case was stated to be for the late payment of the tax and was computed at 10 percent for the first month of delay and 2 percent a month thereafter up to 35 percent. The delay was determined to commence at the sale of each unit. For ease of computation during the audit, an averaging convention was agreed to and used in the calculation of the entire amount.

CONCLUSIONS OF LAW

A. The penalty for late payment of tax under Tax Law § 1446.2 shall be sustained. The penalty can be waived only upon a finding of the existence of reasonable cause and the absence of willful neglect (Tax Law § 1446.2). There was no reasonable cause for delay in payment. The tax was due under the second sentence of section 1442 and, as admitted by petitioner, when the condominium units were sold. Petitioner's testimony (very conclusory in nature at best) as to financial difficulties relate to the earlier construction phase of the project. Presumably those difficulties were overcome when it received the proceeds of the sale of the units. No financial statements for that time have been submitted and petitioner has not explained why it could not pay the tax then, but why it could pay a year or more later.

B. The petition of Fireside Venture Associates is denied and the notice of determination issued May 21, 1987 is sustained.

DATED: Albany, New York
November 23, 1988

/s/ Nigel G.

Wright _____
ADMINISTRATIVE LAW JUDGE